266; *Chase* v. *Denny*, 130 Mass. 566; and many other cases.

The other class of cases is where one has at the time of his sale or mortgage, a potential, inchoate, or embryo interest in the property mentioned, which subsequently ripens into a complete and perfect interest; and then the title vests in the first grantee as against third persons, even though the property has much changed or developed, and increased in value since the first sale or mortgage thereof. This is familiar law since the days of Chief Justice HOBART: *Grantham* v. *Hawley*, Hob. 132. Therefore, the owner of sheep may sell the next year's growth of wool; or of a herd of cows the next season's milk, or butter; the owner or lessee of land, the future artificial crops, &c.: *Cayce* v. *Stovall*, 50 Miss. 396; *White* v. *Thomas*, 52 Id. 49; *Thrash* v. *Bennett*, 57 Ala. 156; *Stearns* v. *Gafford*, 56 Id. 544; *Jones* v. *Webster*, 48 Id. 109; *Butler* v. *Hill*, 1 Baxter (Tenn.) 375; *Stephens* v. *Tucker*, 55 Ga. 543; s. c. 58, Id. 391; *Cook* v. *Steel*, 42 Tex. 53; *McGee* v. *Fitzer*, 37 Id. 27; *Moore* v. *Byrum*, 10 So. C. 452; and many others.

This last is more obvious where the crop has been in fact planted when the mortgage or sale thereof is made; as in *Cotten* v. *Willoughby*, 83 N. C. 75; but many courts hold this not essential, and declare that if the mortgagor owns or has a lease of the land on which the crop is to be raised, he may by apt terms make a valid mortgage of an unplanted crop therefrom: *Arques* v. *Wasson*, 51 Cal. 620; *Van Hoozer* v. *Cory*, 34 Barb. 12; *Conderman* v. *Smith*, 41 Id. 404; *Watkins* v. *Wyatt*, 9 Baxt. 250. Though in the absence of statute this extension of the law of potential existence is not everywhere approved. See *Tomlinson* v. *Greenfield*, 31 Ark. 557; *Hutchinson* v. *Ford*, 9 Bush 318; *Redd* v. *Burrus*, 58 Geo. 574.

But notwithstanding the substantial uniformity of the decisions as to the general rule involved, in the principal case, and when only the legal title is involved, as between successive purchasers or mortgagees, yet there is a class of cases following *Holroyd* v. *Marshall*, in which in a court of equity the rights of the first mortgagee or grantee will be protected, as against certain parties claiming the same after-acquired property by a succeeding conveyance from the same grantor: *Mitchell* v. *Winslow*, 2 Story 644; *Beale* v. *White*, 94 U. S. 382; *Brett* v. *Carter*, 2 Low. 458; *McCaffrey* v. *Woodin*, 65 N. Y. 459. But even this is not uniformly assented to.

EDMUND H. BENNETT.

Boston, April 1st 1885.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

BOYD v. CONKLIN.

A rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with surface water, that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that had always been on his premises, and of getting rid of the inflow.

The maxim "*Sic utere tuo alienum non lædas*" applied.

ERROR to Lenawee.

A. L. Millard and *Bean & Underwood*, for plaintiff.

Merritt & Wooden and *C. A. Stacy*, for defendants.

CAMPBELL, J.—Boyd sued defendants for removing part of a dam which he had built across the outlet which drained an adjoining highway and higher lands adjacent. Lorenzo D. Dewey owned a farm running north of the highway about half a mile, and a swale ran through this land from north to south, which crossed the road through a culvert, from which the water flowed across Boyd's farm to a pond on his land which has no surface outlet. The swale is crossed by an old beaver dam near its north end, and a creek called Evans's creek, a little to the north of it, sometimes overflows, so that the water runs over this beaver dam into the swale. The swale carries down all the surface water on Dewey's land, and there was testimony tending to show that it was partly fed by springs, although this was disputed. Both farms are inclosed by a ridge, which prevents any water passing from Dewey's land from escaping except through the swale and into the pond, and there is no other way of draining the highway. The soil is clay, except to the south and east of the pond, where it is gravelly, and where there is some escape of water by percolation, and possibly by a subterranean outlet.

Both farms seem to have been in private hands for above fifty years. The road appears, by the testimony, to be the La Plaisance Bay Turnpike, which was, as we are judicially informed by public statute, laid out in 1832, and built by the United States government, and subsequently became subject to state authority, and is now in charge of the ordinary town authorities. Just north of the road (which runs east and west on the section line between sections 32 and 29, in township 5 S., of range 4 E.) the swale widens on Dewey's land into a small pond. The pond on Boyd's land is never dry, and before he built the dam contained usually from 6 to 8 acres, of which a space of several acres became dried by means of the exclusion of the water which came down from the lands above, which had no other escape. The dam was a solid structure 12 feet thick at the base and 7 feet in the top, about a hundred paces long, and higher than the highest part of the culvert or highway. Its effect was to submerge the road, and also to throw

the water all back over the highway and upon Dewey, where it had no escape but by evaporation.

Boyd purchased the farm, which contains a little over 90 acres, in 1872, at which time there was no obstruction to the flowage. He first built the dam in 1877, and it was removed, so as to give room for the water, in 1878 by the highway commissioner. Being rebuilt, it was removed in 1879 by defendants, under the direction of the local authorities: Conklin himself being commissioner, and acting in pursuance of their instructions. The case, as it is now before us, presents no complications. The dam was built for the sole and express purpose of shutting out the water, which had its only outlet through the swale and over Boyd's land, and this was its original and natural outlet. It was not artificial, but had always existed since the country was known; and the existence of a beaver dam makes it not unlikely that it was once a running stream. Whether its waters are, to any extent, from spring or not, they include the whole surface drainage, and are not confined to passing storms. There is some testimony of occasional attempts by the lower owners to obstruct the water, but no evidence of acquiescence, and very little, if any, of submission by the highway authorities to such obstructions.

If this had been an artificial drainage, the long existence of the road, which could not be kept in repair without drainage, and the undisputed fact that a regular culvert has existed at least since 1845, and that no other drainage was possible, would, in our opinion, put plaintiff to very strong proof to overthrow the presumption of right. The court below gave plaintiff the benefit of that analogy, and, going very far in the endeavor to avoid giving occasion for cavil, limited defendant's justification to a substantially uninterrupted enjoyment of the drainage for twenty years, without substantial objection to the public or highway authorities. But plaintiff insists that his right to intercept surface water cannot be cut off in that way, and that, except in case of living waters in a defined and regular channel, there is no such obstacle, or none without such an undisputed prescriptive right as would be equivalent to a grant.

On the argument the whole subject was discussed with much ability. It is not necessary, however, to consider any more of the legal theories than such as have some application on the facts. The real question here was whether one land-owner can, at his

pleasure, erect such barriers as will flood his neighbor's land with water that otherwise would escape over his own, in order to partially or wholly reclaim the bed of a pond which has always existed there, and get rid of the inflow. In its natural condition neither the highway nor the upper lands would be drowned. The effect of the dam is to cover portions of them with water that cannot escape.

It was urged strenuously on plaintiff's behalf that there is a radical difference between the common and the civil law upon the subject of the relations of upper and lower estates as to water easements and servitudes, and that at common law the latter owes no service to the former in regard to the flow of surface water. As we are not expected, officially, to be experts in the civil law, we shall not attempt to discuss that department of jurisprudence as a separate subject. But it so happens that from the time of Bracton down attention has been frequently called by the common-law courts to the fact that the whole subject of rights in water has been defined by the civil law writers in terms which substantially agree with the recognised rules of the common law, and that they agree very closely, not necessarily because one has been borrowed from the other, but rather because both are naturally drawn from the general usages and necessities of mankind.

All of the considerations which belong to the present case depend on the reciprocal action on both upper and lower proprietors of the maxim that every man, in the use of his own property, must avoid injuring his neighbor's property as far as possible. And while the cases cited on the hearing show that courts have sometimes indulged in sweeping language that, taken independently, would lead to remarkable results, the facts on which the apparently conflicting rulings rest greatly narrow their substantial repugnance. There are, it must be admitted, decisions that cannot possibly be harmonized; but their number and their force do not equal their apparent importance. And there is no subject on which local usages have had so much weight in shaping the local common law as the incidents of real estate. There are parts of the Union where the land laws have always differed from the common law of other states, while the law relating to water has been laid down in a large part of the United States, in a uniform manner, without reference to their ancient condition as French, Spanish or English colonies. The civil-law definitions, or what are supposed to be

such, are quoted as often under the one class of antecedents as under the other.

The chief differences pointed out on the argument as important in weighing decisions as furnishing precedents, related to distinctions between living streams in a natural flow and water of a different character in artificial escapes or in surface descents—to distinctions between urban and rural servitudes—and to the purposes for which dams or other interruptions are made. It is not disputed that perennial flowing streams of living water impose similar duties, and confer similar rights on all riparian proprietors under all systems of jurisprudence. It is not disputed that under what is claimed to have been the civil-law rule, the rural proprietor of lower lands was required to receive the water flow of surface water from the upper lands coming in substantially its natural amount and condition. Beyond this we cannot harmonize much of the contention of counsel, and must dispose of the case as it appears to us. A number of the most striking cases cited by plaintiff's counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these it was claimed that there was no substantial foundation for any distinction between urban and rural property.

There is no question but that such a distinction is recognised in the civil-law authorities referred to on the argument, as well as in several of the cases cited. The distinction is one of substance, and not arbitrary. As already suggested, the adjoining owners owe mutual duties—the one to receive the natural flow, and the other not to injuriously change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface water. Grades must usually be established for streets and sidewalks and pavements, and other surface changes are usual, in addition to the walls of buildings, which, with their embankments, must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially. And where the same rule has been applied to towns as to the coun-

try, it has, in some cases, at least, been done expressly because in the circumstances of the record the particular land in question had remained under rural conditions. If, as seems to be true, some decisions ignore the distinction, they depart from the old rule, and cannot be maintained as harmonious with the general line of authority, unless on special facts which do not justify their broad *dicta*.

The Massachusetts cases lay down so broadly the right of the lower proprietor to cut off the water flowing down on him, that whatever distinction may be found in their facts, the court evidently meant to disregard them. The Wisconsin cases perhaps go about as far, and the Indiana rule is stated in similar terms. It can hardly be said that there is any fixed New York rule which would apply to such a case as the present. In the case of *Barkley* v *Wilcox*, 86 N. Y. 140, where the interference with the water was by building and banking up a house near a street, the facts did not call for any very general discussion, and the court, while expressing a preference for the views of the Massachusetts courts over the rule in Pennsylvania and other states to the contrary, saw the necessity of caution in adopting those views too universally, and left the door open to deal with cases like this on their own footing. In *Bowlsby* v. *Speer*, 2 Vroom (N. J.) 351, the facts and the decision were like those in *Barkley* v. *Wilcox*, but can hardly be said to disturb the earlier case of *Earl* v. *De Hart*, 1 Beasl. 280, where the civil-law principle was treated as in some cases furnishing a proper rule for town property which was not so situated as to require a different treatment.

Mr. Washburn, in his treatise on Easements, p. 355, indicates that the Massachusetts rule is not sustained by the weight of American authority, and that the rule known as the civil-law rule has been more generally accepted. He cites most of the authorities brought to our attention on the argument, and they unquestionably sustain the existence of duties between the respective landowners to do no harm to each other against the natural servitude. Much of the discussion found in the cases referred to turns, not on the right of the upper owner to have egress for his water, but upon the right of the lower owner to have the water come down. In the present case, Boyd does not seem to desire this supply. But it is quite supposable that, if this pond were not entirely on his

premises, it might be of some importance to the neighboring land that it should not be diminished or destroyed.

It is not necessary on this record to determine how far defendants could themselves have shut off the supply, because it is evidently not for their interest to do so. But there is no lack of cases which hold that rights may exist in a flow of water which is not a natural living stream. And while here, as in other cases, the rights of parties must depend somewhat on the circumstances and surroundings, the general principle underlying all the cases is that the upper and lower owners must respect any valuable rights which accrue to either from the position of their lands. The narrow definition of water-courses as natural living streams, which appears in a few cases in the United States, is not an ancient or universal definition. On the contrary, water running in a natural or artificial bed is very frequently, if not generally, so regarded. But names are of small importance, inasmuch as the only consideration that need be looked at is the character and surroundings of the flowage. The following authorities recognise valuable rights in water, and some of them are spoken of expressly as watercourses, which are entirely distinct from natural living streams: Woolr. Wat. 3, 146, 147; *Wright* v. *Williams*, 1 Mees. & W. 77; *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, Id. 602; *Beeston* v. *Weate*, 5 El. & Bl. 986; *Ivimey* v. *Stocker*, L. R., 1 Ch. App. 396; *Watts* v. *Kelson*, L. R., 6 Ch. App. 166; *Nuttall* v. *Bracewell*, L. R., 2 Exch. 1; *Holker* v. *Poritt*, L. R., 8 Exch. 107; *Taylor* v. *Corp. of St. Helens*, 6 Ch. Div. 264; *Magor* v. *Chadwick*, 11 Ad. & E. 571; *Chadwick* v. *Marsden*, L. R., 2 Exch. 284.

Upon such questions as are raised on this record there is, except in the Massachusetts doctrine and the cases which have followed it, very little conflict of opinion. Whatever may be the rights of adjoining proprietors as to the use and diversion of water, there is no right in any one, by raising artificial obstructions, to flood his neighbors' lands by stopping the escape of water that cannot escape otherwise. Some cases have intimated that there might be larger rights of obstruction where the particular drainage was not necessary. But actual mischief done as a natural and necessary consequence of such erections is almost universally treated as an actionable nuisance: *Lawrence* v. *G. N. Railroad Co.*, 16 Q. B. 643; *Rylands* v. *Fletcher*, L. R., 3 H. L. 330; *Tootle* v. *Clifton*,

22 Ohio St. 247; Wood, Nuis. § 386; *Hurdman* v. *N. E. Railroad Co.*, 3 C. P. Div. 168; *Whalley* v. *Lancashire & Y. Railway Co.*, Eng. Ct. App. March 1884, (523 Am. Law. Reg. N. S.) 533; *Brodir* v. *Saillard*, 2 Ch. Div. 692; *Gilham* v. *Madison Co. Railway Co.*, 49 Ill. 484; *Gormley* v. *Sanford*, 52 Id. 158; *Ogburn* v. *Connor*, 46 Cal. 346; *Butler* v. *Peck*, 16 Ohio St. 334; *Nevins* v. *City of Peoria*, 41 Ill. 502; *Livingston* v. *McDonald*, 21 Iowa 160; *Hooper* v. *Wilkinson*, 15 La. Ann. 497; *McCormick* v. *Kansas City Railroad*, 70 Mo. 359; *Shain* v. *Kansas City Railway*, 71 Id. 237.

As previously suggested, the rights of upper and lower owners are not treated by the common-law authorities as peculiar to either common or civil law, but as natural incidents to the land, which are and must be analogous, as governed by universal jurisprudence, except where specially modified. The English courts have never hesitated to cite the civilians on such questions, and they have decided cases arising out of England without attempting to inquire into any local law as the basis of decision. Thus, in the East Indian case of *Ramesur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 App. Cas. 121, the rights of the parties were dealt with just as if they had arisen in England, although the uses of tanks and reservoirs in India must, in all probability, have grown into very ancient customs. In *Smith* v. *Kenrick*, 7 C. B. 515, the Digest was cited as authority. In *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282, and in *Embrey* v. *Owen*, 6 Exch. 353, it is stated that these various rights are not to be regarded as based on any presumption of grants, but as incident to property *jure naturæ*.

Bracton is cited in Wood, Nuis. § 386, as coinciding with the civil-law rule. While he has been regarded as drawing too much from the Roman law in some other matters, no one has doubted that he laid down the common law correctly on this. Britton lays it down very clearly that no one can drown his neighbor's land by erections on his own soil. "Appurtenances," fol. 140. The civil-law rule was recognised and adopted in the customary as well as in the written law, in parts of France, and in Canada and Scotland; and the Roman law in all these regions was modified by local usage, and in many things repudiated. In Basuage's Commentary on the Customs of Normandy it is not treated as a civil-law rule, but as a law of nature. 2 Basuage 565. In *Frechette* v. *La Compagnie*

Manufacturiere de St. Hyacinthe, L. R., 9 App. Cas. 170, the Lower Canada Code is quoted, which seems to be a substantial if not a literal transcript of section 640 of the French Civil Code, and regulates the rights of both classes of owners, forbidding the lower owner from hindering the escape of water by dykes, and forbidding the upper owner from aggravating the flow to the injury of the lower estate. In discussing this clause, a learned writer on the law of property, Charles Compte, speaks of the term "servitude," which strictly denotes a diminution of rights, as an unfortunate and improper phrase to apply to these reciprocal duties. "It is simply a means of preventing usurpation, and of securing to each that which belongs to him." While Erskine, in his "Principles of the Law of Scotland," uses the term "servitude" as including the rights in question, he speaks of them as natural, as contradistinguished from legal servitudes. Book 2, tit. 9. Domat refers to them in the same way, dividing servitudes into those which are natural, and those which do not rest on natural right. Book 1, tit. 12, § 5. And this is further illustrated by his collection of excerpts from the Roman law. 4 Domat, 423.

There seems to be no reason for attempting to draw distinctions between the civil and the common law on this subject. The authorities recognise the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice, and in disregard of the relative conditions arising from its position. Each may do in using his own what is consistent with the fair interests of the other.

The escape of water in the present case is natural and is necessary, and there was no right to prevent it by such a dam as defendants broke through. The charge given was at least as liberal as plaintiff had a right to ask. The judgment should be affirmed.

CHAMPLIN and SHERWOOD, JJ., concurred.

COOLEY, C. J., did not sit.

DEFINITION OF A STREAM.—Before discussing the subject of "surface-water," it is well to have a clear understanding what is meant by the use of that term. It is clear that surface-water is not a watercourse, and with that it is most likely to be confounded.

In *Luther* v. *Winnisimmet*, 9 Cush. 174, a watercourse is defined as "a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water." "A watercourse consists of bed, banks and

water; yet the water need not flow continually; and there are many watercourses which are sometimes dry:" *Fryer* v. *Warne*, 29 Wis. 515; see *Eulrich* v. *Richter*, 41 Wis. 318. In Indiana, after defining a watercourse in the language given, the court said: "There must, however, always be substantial indication of the existence of a stream, which is ordinarily and most frequently a moving body of water:" *Weis* v. *City of Madison*, 75 Ind. 253.

In New Jersey it was said: "A channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in the case of a ditch, or other artificial means, used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land." *Earl* v. *De Hart*, 1 Beasley Ch. 283.

EXAMPLE.—From time immemorial a natural stream of water had flowed from a southerly direction across a road and upon the defendant's land, and thence taking a northwesterly course. A part of the way across the defendant's land it ran in a well-defined channel, but when it reached a point within five rods of the plaintiff's adjoining land, the water spread out over the surface of the ground, covering a space a few rods in width, and so ran upon and across the plaintiff's land, which was a level meadow, and irrigating it in a valuable manner, through its whole length, about seven rods, and thence on to other land of other owners beyond. Over the surface of the defendant's land there was no defined channel, nor through the whole length of the plaintiff's land, and not until a short distance beyond the plaintiff's land, where it again formed a small brook, and ran off in a westerly direction to a river. In an action by the plaintiff for diverting this brook from his land, it was *held*, "that the brook did not cease to be a natural watercourse on the plaintiff's land, and that he could maintain the action:" *Macomber* v. *Godfrey*, 108 Mass. 219. For further example, see *Gillett* v. *Johnson*, 30 Conn. 180; *Barkley* v. *Wilcox*, 86 N. Y. 140; s. c. 40 Am. Rep. 519; *Little Rock, etc., Ry. Co.* v. *Chapman*, 39 Ark. 463; s. c. 43 Am. Rep. 280: *Hebron Gravel Road Co.* v. *Harvey*, 90 Ind. 192.

TWO LINES OF CASES.—As indicated in the principal case, there are two lines of cases, following two distinct rules: the common-law rule and the civil-law rule.

THE COMMON-LAW RULE.—The leading case asserting the common-law rule is *Luther* v. *Winnisimmet*, 9 Cush. 171 (1851). In that case the defendant caused an additional flow of water upon the plaintiff's land, by filling up his own lot. The court charged the jury "that, if there was a watercourse or stream of water running through the land conveyed, the right to the continued flow thereof would pass to the plaintiff under the deed, as a parcel of his grant; that if there was no such watercourse or stream of water the plaintiff could not claim a right of drainage or flow of water from off his land upon and through the defendant's land, merely because the plaintiff's land was higher than the defendant's, and sloped toward it, so that the water which fell in rain upon it would naturally run over the surface in that direction;" and the charge was held strictly correct.

In a New York case is a dictum which has been cited so often, and its statements so unqualifiedly endorsed, that it now has all the weight of an authority: "*A fortiori* one is not obliged to excavate ditches or construct sewers on his own land for the purpose of draining the low or marshy lands of an adjoining proprietor. And in respect to the running off of surface-water by rain or snow, I

know of no principle which will prevent the owner of land from filling up the wet and marshy place on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface:" *Goodale* v. *Tuttle*, 29 N. Y. 459, 466.

In another Massachusetts case it was said: "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing upon it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other direction than they were accustomed to flow." Again: "the obstruction of surface-water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil": *Gannon* v. *Hargadon*, 10 Allen 106.

It, therefore, follows from the reasoning of these cases—which is sustained by many authorities—that the owner of land may lawfully occupy and improve it in such manner as either to prevent water which accumulates elsewhere from coming upon it, as by erecting a wall, dyke or barrier, or to alter the course of the surface-water which falls upon it, or comes upon it from elsewhere; even though water is thereby made to flow upon the adjoining land of another to his damage: *Bates* v. *Smith*, 100 Mass. 181; *Bowlsby* v. *Speer*, 31 N. J. L. 351; *Greatrex* v. *Hayward*, 8 Exch. 291; *Shields* v. *Arndt*, 3 Green Ch. 234; *Barkley* v. *Wilcox*, 86 N. Y. 140; s. c. 40 Am. Rep. 519; *Vanderwiele* v. *Taylor*, 65 N. Y. 341; *Lynch* v. *Mayor, etc.*, 76 Id. 60; s. c. 32 Am. Rep. 271; s. c. 38 Id. 753; s. c. 5 Am. & Eng. R. R. Cas. 82; *Cairo & Vincennes Rd. Co.* v. *Stevens*, 73 Ind. 278; s. c. 38 Am. Rep. 139; s. c. 5 Am. & Eng. R. R. Cas. 58; *Beard* v. *Murphy*, 37 Vt. 104; *Buffam* v. *Harris*, 5 R. I. 253; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Atchinson, &c., Rd. Co.* v. *Hammer*, 22 Kan. 763; s. c. 31 Am. Rep. 216; *Schlichter* v. *Phillipy*, 67 Ind. 201; *Hogenson* v. *St. Paul, &c., Ry. Co.*, 31 Minn. 224; see *O'Brien* v. *City of St. Paul*, 25 Minn. 331.

So a complaint charging the obstruction of a watercourse is not sustained by proof of a flow, though through a ditch, of water which has accumulated from rains or melting snow: *Dickinson* v. *Worcester*, 7 Allen 19; *Ashley* v. *Wolcott*, 11 Cush. 192; *Mumkres* v. *Kansas City, &c., Rd. Co.*, 60 Mo. 334.

The owner of land adjoining a highway may throw up an embankment to prevent the water overflowing his premises where it comes from such highway. Thus where a highway had been laid out for forty years, up a steep hill-side, over which large quantities of surface-water usually flowed down on the upper side of the highway; and a culvert was built by the proper authorities across the highway, extending to the inside of the wall between the highway and the defendant's land, a portion of the wall having been removed for that purpose; and a light trench was dug from the mouth of the culvert, two or three feet in length, into defendant's land to carry the water off, it was held that the defendant might stop up so much of the culvert as was under his wall, even though it had the effect to cause the water to flow over the highway

and injure the travelled road: *Inhabitants of Franklin* v. *Fisk*, 13 Allen 211.

In case of a railway corporation taking land for a right of way, it is held that it is proper to take into consideration the lay of the land and the flow of water in percolating through the land: *Pfleger* v. *Hastings and Dakota Railroad Co.*, 5 Amer. & Eng. Railroad Cases 85; *Waterman* v. *Conn. R. Railroad Co.*, 30 Vt. 610. See *Morrison* v. *Bucksport Railroad Co.*, 67 Me. 353. See, also, *Walker* v. *Old Colony and Newport Railroad Co.*, 103 Mass. 10. So, in New York, it is held that commissioners in grading highways are not bound to provide a channel for drainage of surface-water: *Gould* v. *Booth*, 66 N. Y. 62.

The owner of the upper land may drain off the surface-water into an adjoining stream, even though it may increase the flow: *Waffe* v. *N. Y. Cent. Railroad Co.*, 58 Barb. 413, if such increase is reasonable: *McCormick* v. *Horan*, 81 N. Y. 86; s. c. 479 Am. Rep. 47.

So one may drain off his land even though it have the effect to reduce the supply of a stream where a mill is situated: *Broadbent* v. *Ramsbotham*, 11 Exch. 602; *Rawstron* v. *Taylor*, Id. 369. And the same is true of water percolating through soil beneath its surface: *Chasemore* v. *Richards*, 7 H. L. 374; s. c. 5 Jur. (N. S.) 873; 5 H. & N. 990 (Am. ed.). One cannot, however, foul the surface-water flowing over his land to another's: *Gawtry* v. *Leland*, 31 N. J. Eq. 385; and the same is true of water percolating beneath the surface of the soil: *Hodgkinson* v. *Ennor*, 9 Jur. (N. S.) 1152. See *Brown* v. *Illius*, 25 Conn. 583.

Water flowing from a hollow or ravine, only in time of rain or melting snows, it has been held in New York, is not, in contemplation of law, a watercourse: *Wagner* v. *Long Island Railroad Co.*, 2 Hun 633. See *Earl* v. *DeHart*, 1 Beasl. 280. Yet, in Kansas, the contrary seems to have been held: *Gibbs* v. *Williams*, 25 Kans. 210. See *Barnes* v. *Sabron*, 10 Nev. 218; *Hoyt Hudson*, 27 Wis. 656.

Frequently the question arises whether the owner of the upper land acquires any right by prescription or adverse use to flood his neighbor's lower and adjoining land. In Massachusetts it was held that no period less than twenty years would give the owner of the upper land any right to flood the land of the lower owner, both having derived title from the same grantor: *Luther* v. *Winnisimmet*, 9 Cush. 171. See *Earl* v. *DeHart*, *supra*. However, merely permitting water to flow from the upper to the lower land, when the two pieces are owned by different owners, is not sufficient to create a right to the continuation of the flowage by prescription or adverse usage. See 2 Am. L. Reg. (N. S.) 72; *Prescott* v. *White*, 21 Pick. 342 (ditch); *Wood* v. *Waud*, 3 Exch. 778; *Greatrix* v. *Haywood*, 8 Id. 291; *Arkwright* v. *Bell*, 5 M. & W. 203; *Rawstron* v. *Taylor*, 11 Exch. 369; *Parks* v. *Newburyport*, 10 Gray 29; *Fryer* v. *Warne*, 29 Wis. 511; *Dickinson* v. *Worcester*, 7 Allen 19; *White* v. *Chapin*, 12 Id. 516, 518.

Suppose the surface-water is drained off or backed up with a malicious design to injure an adjoining owner, is there a liability incurred by reason of such design? If it is done under an absolute claim of right and in good faith, under the common law no liability attaches: *Hoyt* v. *Hudson*, 27 Wis. 656; s. c. 9 Am. Rep. 473; *Pettigrew* v. *Evansville*, 25 Wis. 223, 230; *Adams* v. *Walker*, 34 Conn. 466; *Greenleaf* v. *Francis*, 18 Pick. 121; *Wheatley* v. *Bough*, 25 Penn. St. 528; *Delhi* v. *Goumont*, 50 Barb. 316; *Panton* v. *Holland*, 17 Johns. 92, 98; *Chasemore* v. *Richards*, 5 Jur. N. S. 873; s. c. 5 H. & N. 990; 7 H. L. 349. Yet it has been decided that it is immaterial with what motive an

act is done, if it is otherwise lawful. *Chatfield* v. *Wilson*, 28 Vt. 49 ; see also *Frazier* v. *Brown*, 12 Ohio St. 294 ; *Clinton* v. *Myers*, 46 N. Y. 511 ; *Heald* v. *Carey*, 11 C. B. 993 : *Brain* v. *Marfell*, 41 Law Times N. S., note ; *Walker Cronin*, 107 Mass. 555 ; Cooley on Torts 688.

In *Curtiss* v. *Ayrault*, 47 N. Y. 73, the owner of a tract of land, upon which was a swamp, dug a ditch from it through another portion of the tract, making a permanent channel, in which the waters gathering in the marsh flowed in a continuous stream, mutually benefiting the lands drained, and the lands to which it conveyed a supply of good water, and, subsequently, while those reciprocal benefits and burdens existed, and were apparent, he divided the tract into parcels and conveyed the parcels to different grantees, who contracted with reference to the condition of the lands. After the sale of several parcels, it was held that the vendor could not change the ditch in any way, or refuse to permit the water to flow in the ditch, nor could the grantees in any way materially change the original relative condition of one parcel to the injury of another.

EXAMPLES.—The owner of a tract of land sued an adjoining owner for obstructing the passage of driftwood carried by the overflow of an adjacent watercourse during a freshet, by planting a row of trees along the line dividing their lands, by means of which the driftwood was lodged upon the plaintiff's land. It was held that he had no cause of action : *Taylor* v. *Fickas*, 64 Ind. 167 ; s. c. 31 Amer. Rep. 114 ; 18 Am. Law Reg. (N. S.) 249.

A railroad corporation built a large embankment ten feet high, upon which to lay its tracks along its right of way, running across a low and swampy tract of land, and the embankment cut off the natural flow of the water percolating through the soil, and the flow of the water that came from a river, not far off, in times of high water. The water falling upon the plaintiff's land, which lay some distance above the embankment, and that caused by the melting snow, was prevented from flowing off by reason of the water being heaped up on the land adjoining the embankment. It was held that the corporation was not liable to the plaintiff, by reason of his lands having been rendered unfit for cultivation, even through it was alleged that the plaintiff had lost several crops for that reason, and had sustained great damages which proper culverts placed under the embankment would have prevented : *Cairo and Vincennes Rd.* v. *Stevens*, 73 Ind. 278 ; see *Morrison* v. *Bucksport and Bangor Rd. Co.*, 67 Me. 353 ; *Atchison, &c., Rd. Co.* v. *Hanmer*, 22 Kans. 763.

Plaintiff's field lay in an angle made by a railway crossing a highway. Previous to the construction of the railway the water falling upon the highway ran down the road, across where the railway was located, and thus running caused no injury to the plaintiff's land. After its construction the water, prevented by the embankment from flowing off, accumulated at the crossing and flowed back upon the land of the plaintiff. It was held that no cause of action lay against the railway corporation : *Wagner* v. *Long Island Rd. Co.*, 2 Hun 633 ; see *Waffe* v. *N. Y. Cent. Rd. Co.*, 58 Barb. 413.

A railroad corporation, in constructing the road-bed, filled up an artificial ditch on the land of a third person, by which the surface-water was conducted from the plaintiff's premises to a river, and thus turned back the water upon the premises of such person. It was held to give no ground of action : *O'Conner* v. *Fond du Lac, etc., Rd. Co.*, 52 Wis. 526 ; s. c. 38 Amer. Rep. 753 ; 5 Amer. & Eng. Rd. Cas. 82.

THE CIVIL LAW RULE.—Of this rule Justice REDFIELD has said : "There seems to be nothing very definite in the civil-law writers upon this particular point, except that it is fully agreed in the

body of the Roman law (Dig. lib. 89, tit. iii. s. 12), that if one by digging on his own land, in good faith, and with no purpose of injuring his neighbor, nevertheless dry up his well by diverting the underground current from it, there is no remedy by action. * * * But the distinction between surface-water, accumulating in low places from the melting of snows in the spring, and that which had formed more or less permanent channels in the earth in its passage, would not be likely to attract the attention of writers in most of the European countries, and especially in Italy, where no snows ever cover the ground :" 11 Amer. L. Reg. p. 20.

DOMAT says (page 616 Cush. ed.): "Rainwater or other waters which have their course regulated from one ground to another, whether it be by nature, or by some regulation, or by title, or by ancient possession, the proprietor of said grounds cannot innovate anything, as to the ancient course of its waters; thus he who has the upper grounds cannot change the course of the water, either by turning it some other way or rendering it more rapid, or making any other change in it to the prejudice of the owners of the lower grounds."

One of the leading cases following this rule is *Martin* v. *Riddle*, reported in a note to *Kauffman* v. *Griesemer*, 26 Pa. St. 407, where the law is very well stated: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances; hence, the owner of the lower ground has no right to erect embankments, whereby the natural flow of water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on the lower gronnd; nor can he collect into one channel water usually flowing off into his neighbor's fields by several channels, and thus increase the waste upon the lower fields."

A number of states have adopted this rule: *Nininger* v. *Norwood*, 72 Ala. 277; s. c. 47 Amer. Rep. 412; *Hughes* v. *Anderson*, 68 Ala. 280; s. c. 44 Amer. Rep. 147; *Gilham* v. *Madison County Railroad Co.*, 49 Ill. 484; *Gormley* v. *Sanford*, 52 Id. 158; *Toledo, &c., Railroad Co.* v. *Morrison*, 71 Id. 616; *St. Louis, &c., Railroad Co.* v. *Capps*, 72 Id. 188; *Jacksonville, &c., Railroad Co.* v. *Cox*, 91 Id. 500; *Ogburn* v. *Connor*, 46 Cal. 346; s. c. 13 Amer. Rep. 213; *Butler* v. *Peck*, 16 Ohio. St. 334; *Tootle* v. *Clifton*, 22 Id. 247; s. c. 10 Amer. Rep. 732; *Miller* v. *Laubach*, 47 Pa. St. 154; *Martin* v. *Jett*, 12 La. 502, *Lattimore* v. *Davis*, 14 Id. 161; *Delahousaye* v. *Judice*, 13 La. Ann. 587; *Minor* v. *Wright*, 16 Id. 151; *Overton* v. *Sawyer*, 1 Jones L. (N. C.) 308; *Porter* v. *Durham*, 74 N. C. 769. See *Raleigh, &c., Railroad Co.* v. *Wicker*, 74 Id. 220; *Livingston* v. *McDonald*, 21 Iowa 160 (a leading case); *Van Orsdol* v. *Burlington, &c., Railroad Co.*, 56 Id. 470; s. c. 5 Amer. & Eng. Railroad Cases 53; *Herrington* v. *Peck*, 11 Bradw. 62; *Hicks* v. *Silliman*, 93 Ill. 255; *Ludeling* v. *Stubbs*, 34 La. Ann. 935; *Guesnard* v. *Bird*, 33 Id. 796; *Barrow* v. *Landry*, 15 Id. 681; *Louisville, &c., Railroad Co.* v. *Hays*, 11 Lea (Tenn.) 382; *Executor of Lord* v. *Carbon Iron Manuf. Co.*, 38 N. J. Eq. 452.

An injunction to enjoin the throwing up of an embankment so as to prevent the natural flow of the surface-water, will be refused; because the plaintiff has his right of action at law: *Luney* v. *Jasper*, 39 Ill. 46.

But the plaintiff is not estopped by his deed of grant of way to a railroad company, from bringing a suit for damages in obstructing the surface-water:

Jacksonville, &c., Railroad Co. v. *Cox*, 91 Ill. 500.

In *Livingston* v. *McDonald*, 21 Iowa 160, it was held, "that the owner of the higher land had an unqualified right to drain for agricultural purposes the surface-water, or water flowing in no regular or definite channel upon his own lands, and is not liable to an action by the lower proprietor for so draining as to prevent any portion of those waters reaching the land of the lower owner;" but "the owner of the higher land has no right, even in the course of the use and improvement of his farm, to collect the surface-water upon his own lands into a drain or ditch, increased in quantity or in manner different from the natural flow, upon the lower lands of another, to the injury of such lands." The last part of this proposition is the rule of the civil law; and the first part is not in contravention of the common law.

EXAMPLES.—A stream ran through the plaintiff's land. In times of heavy rains large quantities of water escaped over the banks of this stream upon the plaintiff's lands, and with the accumulations of rainwater, had a natural outlet therefrom over the lands of the defendants. To prevent these waters from flowing over and flooding their lands, the defendants erected embankments upon the plaintiff's lands, rendering them less fit for cultivation, and in other respects injuring them. It was held that an injunction to restrain the defendants preventing the water from flowing was rightly granted: *Nininger* v. *Norwood*, 72 Ala. 277; S. C. 47 Amer. Rep. 412.

The plaintiff and defendant were coterminous land-holders, each engaged in agriculture, the former owning the inferior, and the latter the superior heritage. Through the plaintiff's lands, and near the dividing line, flowed a natural stream or branch, which was the natural outlet for a part, at least, of the water, which fell on defendant's land. The water flowed naturally from the defendant's land upon the plaintiff's land, and across a portion of it into the stream. It flowed slowly, not in a collected body, but scattered over the surface. In its natural state, part of the water was absorbed, and part evaporated before it reached the lands of the plaintiff. By means of ditches, the defendant collected all this surface-water into one channel, thereby draining his own lands and causing the water to flow much more rapidly, and in one body, into the branch on the plaintiff's lands. This emptied the water off the defendant's land much sooner, and as a consequence, precipitated it much more rapidly, and in increased volume on the plaintiff's land, thereby flooding a portion of his lands, and rendering them uncultivable. It was ruled that the "defendant had no right, by ditches or otherwise, to cause water to flow on the lands of the plaintiff, which, in the absence of such ditches, would have flowed in a different direction. As to the water theretofore accustomed to flow on the lands of the plaintiff, the defendant was not bound to remain inactive. He was permitted to so ditch his own lands, or to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. This, however, must be weighed and decided with a proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior; and even the license must be conceded with great caution and prudence. It is a question for the jury to determine, on the facts of each particular case, under proper instructions from the court:" *Hughes* v. *Anderson*, 68 Ala. 280; S. C. 44 Amer. Rep. 147.

MISSOURI CASES.—The Missouri cases are in much confusion, first following the civil law: *Lumier* v. *Francis*, 23 Mo.

181; *Shane* v. *Kansas City, &c., Rd. Co.*, 71 Id. 237; s. c. 36 Am. Rep. 479; 5 Am. & Eng. R. R. Cas. 64.

Other cases seem to follow the common-law rule: *Mumkers* v. *Kansas City, &c., Rd. Co.*, 72 Mo. 514; s. c. 5 Am. & Eng. R. R. Cas. 79; *McCormick* v. *Kansas City, &c., Rd. Co.*, 70 Me. 359; *Jones* v. *Hannovan*, 55 Id. 462; *McCormick* v. *Kansas City, &c., Rd. Co.*, 57 Id. 433. In the latest case the court swings back to the civil-law rule: *Benson* v. *Chicago & Alton Rd. Co.*, 78 Mo. 504.

NEW HAMPSHIRE RULE.—The New Hampshire court pursues a middle course, it would seem, between the two accepted rules. In *Bassett* v. *Salisbury Manf. Co.*, 43 N. H. 569; 28 Id. 438; 3 Am. L. Reg. 223, it was held in respect to water percolating through the soil that the landowner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land. In *Sweet* v. *Cutts*, 50 N. H. 439; s. c. 11 Am. L. Reg. 11, the same rule was applied to surface-water.

In Vermont a rule not very dissimilar from the New Hampshire rule was followed: *Beard* v. *Murphy*, 37 Vt. 99; *Chatfield* v. *Wilson*, 28 Id. 49.

The principal case does not differ greatly from the rule of these last three cases; and, perhaps, on the whole, they announce the most just and equitable rule.

DOCTRINE APPLICABLE TO BOTH RULES.—All the cases agree, however, whatever rule they may pursue, that one adjoining landowner cannot gather surface-water into a body and discharge it in a mass or body upon his neighbor's land. Such is the recent English case of *Whalley* v. *Lancashire, &c., Ry. Co.*, 23 Am. L. Reg. 633; s. c. 50 L. T. 472; *Weis* v. *Madison*, 75 Ind. 241; *Gillison* v. *Charleston*, 16 W. Va. 282; *Rylands* v. *Fletcher*, L. R., 3 E. & I. Ap. Cas. 330; *Templeton* v. *Vashoe*, 72 Ind. 134; *Tootle* v. *Clifton*, 22 Ohio St. 247; s. c. 10 Am. Rep. 732; *Ogburn* v. *Connor*, 46 Cal. 346; s. c. 13 Am. Rep. 213.

Nor can the owner of the upper land lawfully discharge the waters of a natural pond or reservoir of surface-water through an artificial channel directly over the land of another: *Pettigrew* v. *Evansville*, 25 Wis. 223; s. c. 3 Am. Rep. 50; *Livingston* v. *McDonald*, 21 Iowa 160, (an under-ground ditch); *Foot* v. *Bronson*, 4 Lans. 47; nor from springs: *Curtis* v. *Eastern Rd. Co.*, 98 Mass. 428: even though it flow naturally that way: *McCormick, &c., Rd. Co.*, 70 Mo. 359; s. c. 35 Am. Rep. 431; *Gillison* v. *Charleston*, 16 W. Va. 282.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of California.

HART v. WESTERN UNION TELEGRAPH COMPANY.

A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher, or was otherwise unintelligible to the company.

A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received